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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 331

OTIS HINES,
Petitioner,

v.

CITY OF MAYSVILLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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I

OPINIONS OF COURTS BELOW

The judgment of the Police Court of Maysville, Mason County Kentucky, record page 4.

The judgment of the Mason Circuit Court found at record, p. 9.

Petition for Rehearing, Kentucky Court of Appeals found at record p. 43. No written opinion by the court.

The Judgment of the Kentucky Court of Appeals found at record p. 41. No written opinion by the Court.

II

JURISDICTION

The jurisdiction to review this cause by writ of certiorari is conferred upon this Court by Title 28, Section 1257 (3)—U.S.C.

III

SUMMARY STATEMENT

Otis Hines was convicted in the City Court of Maysville, Kentucky, on a charge of Breach of the Peace under authority of a city ordinance which imposed a maximum penalty of five hundred ($500.00) Dollars fine and one year imprisonment. The specific allegation is that while sitting in his automobile parked on one of the streets of the City of Mayville, his trousers were open and his person exposed in the presence of men and women. In the Police Court he was fined five hundred ($500.00) Dollars and sentenced to six (6) months imprisonment. From this judgment he appealed to the Mason Circuit Court and on a de novo hearing was found guilty by a Jury who fixed his punishment at a five hundred ($500.00) Dollars fine and one year imprisonment.

IV

SPECIFICATION OF ERRORS

(1) In holding that the judgment of the Mason Circuit Court should be and is affirmed.

(2) In not holding that the penalty laid upon the petitioner pursuant to his conviction under Commissioner's Ordinance #214 was excessive and unusual and violative of the due process plause of the Fourteenth Amendment of the Constitution of the United States.

V

QUESTIONS PRESENTED

(1) Is the penalty as imposed by the Mason Circuit Court of Maysville, Mason County, Kentucky, based upon Commissioner's Ordinance #214, R. p. 14, so excessive, cruel and unusual to the extent that it deprives this peti-

tioner of his constitutional rights as guaranteed by the Constitution and particularly due process of law within the meaning of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

VI

DISCUSSION

It is the contention of the Petitioner that the Ordinance in question under which he was convicted and sentenced violates the due process clause of the Fourteenth Amendment of the Constitution of the United States in that the penal provisions thereof are grossly disproportionate for the offense so penalized. Whether a penalty prescribed for the violation of an Ordinance is so unreasonable as to render it void depends upon its relation to the seriousness of the offense interdicted. *Edwards and Brown Coal Company* vs. *Sioux City*, 213 Iowa 1027, 240 N.W. 711. It is inconceivable that an ordinance prescribing a maximum penalty of Five Hundred ($500.00) Dollars fine and twelve (12) months imprisonment or both, for such a trivial offense as the one allegedly committed by the petitioner in this case could be within any bound of reason. Penalties should be fixed with regards to the offenses. They ought not, as here, be all thrown in together large and small under the same measure of punishment. In *re Frazee*, 63 Mich. 396, 30 N.W. 72.

VII

REASON RELIED ON BY ALLOWANCE OF THE WRIT

The Constitutional question as to whether or not the Fourteenth Amendment of the Constitution of the United States prevents a Municipality from creating and enforc-

ing an ordinance, the penal provisions of which are so disproportionate to the offense covered is one which seems to be of general importance. The question does not appear to have been passed upon by this Court and it would seem that it should be settled.

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APPENDIX

(Article XIV, Section 1, Constitution of the United States)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Commissioners Ordinance No. 214

AN ORDINANCE PRESCRIBING PENALTIES FOR BREACH OF THE PEACE, RIOT, ROUT, UNLAWFUL ASSEMBLY AND AFFRAY.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF MAYSVILLE, KENTUCKY

Section 1. Any person who is guilty of breach of the peace, riot, rout and unlawful assembly, or affray shall be fined not more than $500.00 or imprisoned for not less than five days nor more than twelve months, or both, so fined and imprisoned.

Section 2. This ordinance shall be in full force and effect from and after its second reading and final passage.

Read first time and approved:
October 17, 1949.

Read second time and adopted:
October 24, 1949.

10

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v.

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Respondent.

RESPONSE

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RESPONSE.

I.

OPINIONS OF COURTS B BELOW.

Judgment of the Police Court of f Maysville, Mason County, Kentucky (Record, 4).

Judgment of the Mason Circuit Court on *de novo* hearing (Record, 9).

Petition for Rehearing, Kentucky Court of Appeals (Record, 43).

Judgment of the Kentucky Court t of Appeals (Record, 41).

Official citation 249 S. W. 2d page 23.

II.

JURISDICTION.

Petitioner claims that penalty imposed under the following ordinance:

> Commissioners Ordinance No. 214
>
> AN ORDINANCE Prescribing Penalties for Breach of the Peace, Riot, Rout, Unlawful Assembly and Affray.
>
> *Be it ordained by the Board of Commissioners of the City of Maysville, Kentucky:*
>
> Section 1. Any person who is guilty of breach of the peace, riot, rout and unlawful assembly, or affray shall be fined not more than $500.00 or imprisoned for not less than five days nor more than twelve months, or both, so fined and imprisoned.
>
> Section 2. This ordinance shall be in full force and effect from and after its second reading and final passage.
>
> Read first time and approved: October 17, 1949.
>
> Read second time and adopted: October 24, 1949.

is without due process of law under Article XIV, Section 1, Constitution of the United States:

> ARTICLE XIV.
>
> Section 1. All persons born or naturalized in the United States, and subject to the ju-

risdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III.

STATEMENT OF THE CASE.

Petitioner, Otis Hines, was convicted of a misdemeanor, to wit: Breach of the Peace and his punishment was fixed upon the verdict of a jury at $500.00 fine and imprisonment in the county jail for 12 months.

On March 2, 1951, in the City of Maysville, Mason County, Kentucky, petitioner, Otis Hines was parked in his automobile on West Second Street (E. 3-10-15).

It was a Coupe with the windows rolled down (E. 6-10). Hines was sitting in the middle of the seat (E. 3-10-15). Hines was by himself (E. 15). He had his pants unfastened, handling his privates (E. 8-11-16). This action was over a substantial length of time (E. 4-11). He could be seen from the public street (E. 11-16).

School was just out and school children, both boys and girls, and some adults, male and female, were walking by the car (E. 6-11-16). Some were laughing as

they went by the car (E. 17). Hine as in the condition of lewd desire (E. 11).

Petitioner, Otis Hines, was on Ma 17, 1951, tried in Police Court, Maysville, Kentucky der City Ordinance for Breach of the Peace, fou guilty and his punishment fixed at $500.00 fine and months imprisonment.

On appeal to Mason Circuit Cou e was tried, *de novo*, on October 2, 1951, under Ci Ordinance for Breach of the Peace, found guilty an s punishment fixed at $500.00 fine and 12 months im onment.

The judgment of the Mason Ci t Court was affirmed on March 28, 1952, and reh ng denied on June 13, 1952, by Kentucky Court of peals.

IV.

ARGUMENT.

(1) Respondent Has Received Insufficie Notice Herein.

Under Rule 38 (Section 3), Supre Court of the United States,

> "Notice of the filing of the p tion, together with a copy of the petition, pri d record and supporting brief, shall be served the petitioner on counsel for the respondent thin ten days after the filing (unless enlarged b the court, or a justice thereof when the court is ot in session), and due proof of service shall b filed with the clerk" * * *

the notice is insufficient.

In this case respondent has not received a copy of the record. Reference notice.

(2) The Federal Question Was Not Set Up at the Proper Time and in the Proper Way.

The only Federal question ever intimated in the courts below by petitioner is that suggested in the petition for rehearing (Record, 43), in which petitioner says that the punishment is cruel and violative of Section 17 of the Constitution of Kentucky, which is as follows:

> "Section 17. Excessive bail or fine or cruel punishment, prohibited. Excessive bail shall not be required nor excessive fines imposed, nor cruel punishment inflicted." . .

and that the same is copied from Article VIII of the United States Constitution (Article VIII adds the word "unusual").

Of course, it is fundamental and requires no citations that Article VIII of the United States Constitution is a limitation only on Federal power and has no effect on State action.

Never was the proposition of a violation of due process injected in any manner in the case because the penalty was, and the petition for writ of certiorari is quoted herewith,

> * * * "so excessive, cruel and unusual to the extent that it deprives this petitioner of his constitutional rights as guaranteed by the Constitution and particularly due process of law within

> the meaning of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States"

until said petition for writ of certiorari was filed in this Court on September 12, 1952. The record so reflects.

Therefore, the Federal question was presented too late and improperly.

To illustrate, we quote New York *Ex Rel.* Cohn v. Graves, 300 U. S. 308, 81 L. Ed. (Adv. 409), 57 S. Ct. 466, 108 A. L. R. 721:

> "A ground for recovery of the tax assigned by appellant's petition was that the tax was in substance and effect a tax on real estate and tangible property located without the state, in violation of Fourteenth Amendment of the Constitution of the United States.
>
> "We accordingly limit our review to the question considered and decided by the state court, whether there is anything in the Fourteenth Amendment which precludes the State of New York from taxing the income merely because it is derived from sources, which, to the extent indicated, are located outside the State."

The Court held that the New York tax law did not violate the Fourteenth Amendment, but the appellant further insisted that the State Court infringed due process by giving retroactive effect to the New York tax law. The Court answered this argument as follows:

"The record does not disclose that appellant raised in the State court the objection, which she presses here, to the retroactive application of the statute. In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

(3) The Fourteenth Amendment Does Not Comprehend the Eighth Amendment.

The following guarantees of the Bill of Rights have been excluded from the operation of the Fourteenth Amendment: The protection against self-incrimination (Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14 (1908); its requirement of indictment by grand jury (Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111 (1884); and trial by a common-law petit jury (Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448 (1900).

It is felt that the guarantee in this particular case is not encompassed in the Fourteenth Amendment. Petitioners claim is not of such a character that it can not be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

(4) The Due Process Clause of the Fourteenth Amendment Was Not Infringed.

Petitioner claims that his offense was trivial: It is clear from a reading of the statement of facts that there is shown by his lewd desire, moral depravity. Such sexual offenses often result in the death of a child. Sexual perversion is a grave danger to society, especially its adolescents. The penalty was appropriate as well as within the limits of the law.

The case of Collins v. Johnston, 237 U. S. 502, 35 S. Ct. 649, involving the giving of false testimony in a domestic relations question and resulting in a penalty of fourteen years imprisonment, is germane.

The Supreme Court said:

> "To establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the law-making power, are functions peculiarly belonging to the several states; and there is nothing to support the contention that the sentence imposed in this case violates the provisions of the 14th Amendment * in depriving appellant of his liberty without due process of law" . . . "But it is hardly necessary to say that the comparative gravity of criminal offenses, and whether their consequences are more less injurious, are matters for the state itself to determine."

The legislative Act herein attacked was clearly a matter of local concern for the protection of morals, decorum and the general welfare of the City.

Compare the case at bar of stealing a large chicken, or a small hog, thrice, for which a life sentence may be received.

Who can say that the punishment inflicted upon petitioner will shock the moral sense of all reasonable men?

Who can say that it is clearly and manifestly cruel?

Under these standards the legislative Act of the City is constitutional.

The case of Weber v. Commonwealth, 303 Ky. 56, 196 S. W. 2d 465, citing Weems v. U. S., 217 U. S. 349, 30 S. Ct. 544, 549, 54 L. Ed. 793, 19 Ann. Cas. 705, is authority for these observations.

It would further seem that cases presenting the queston of cruel and unusual punishments directly under Article VIII of the Federal Constitution would be broader in scope and more favorable to a defendant than such cases presented under the due process of law clause of the XIV Amendment because the VIII Amendment deals with a specific and the XIV Amendment with a generality. The petitioner herein was not deprived of anything basic or fundamental within the concept of our jurisprudence.

The petitioner cites Edwards and Brown Coal Company v. Sioux City, 213 Iowa 1027, 240 N. W. 711, and *In re Frazee,* 63 Mich. 396, 30 N. W. 72. Neither are apropos. The Edwards case concerns the regulation of the use of private property with such penalties that discourage resort to the courts. The Frazee case involves State interpretation of the common law and Constitution of Michigan. Note that it is therein said:

> "It has never been customary in our state legislation to leave any discretion in courts upon penalties under highway acts and others involving no more than violations of legal provisions of a civic nature."

For these reasons due process has not been infringed.

V.

CONCLUSION.

It is felt that the Federal question herein presented by petitioner is an afterthought and for the purpose of delay; that the sexual act proved as shown by the record is reprehensible; and it is earnestly insisted for the reasons given that the petition for writ of certiorari be denied and the judgment of the Court of Appeals of Kentucky be affirmed.

Respectfully submitted,

PHILIP HARGETT,
Attorney for Respondent.